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No. 96-205

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CHARLES A. TORO,

Petitioner,

vs.

DEPOSITORY TRUST CO., STUART FISHBEIN, LORI KLEBOUS-ZIVNY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT (APPELLATE DIVISION, 1ST DEPARTMENT) OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED

Did the Appellate Division of the Supreme Court of the State of New York err in affirming the dismissal by the New York Supreme Court, County of New York, of Petitioner's petition (pursuant to New York City Administrative Code § 8-110) to set aside the factual finding of the New York City Commission on Human Rights that Petitioner had not been discriminated against on the basis of his alleged disability?

PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES

The Depository Trust Company does not have any parent companies or any non-wholly owned subsidiaries.

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PRELIMINARY STATEMENT

Petitioner requests that the United States Supreme Court (i) review the findings of fact made by the New York City Commission on Human Rights (the "Commission") that he was not discriminated against on the basis of his disability, and (ii) reject the findings of both the New York Supreme Court, County of New York (hereinafter "New York Supreme Court") and the New York Supreme Court, Appellate Division (hereinafter "New York Appellate Division") that the Commission's factual determinations were supported by substantial evidence. Significantly, Petitioner does not allege that either the Commission or the New York courts applied an incorrect federal legal standard or otherwise misconstrued federal law. Rather, as he did before the New York courts, his Petition simply rehashes factual allegations and arguments that were rejected by the Commission.

In addition, Petitioner has not presented any of the "compelling reasons" set forth in Rule 10 of the Supreme Court that might warrant a grant of certiorari. In particular, this case does not involve a decision by a United States Court of Appeals, nor does Petitioner assert that any of the New York courts have decided any important federal question that conflicts with a decision of a Court of Appeals or a state court of last resort. Indeed, the relevant state court of last resort in this case, the New York State Court of Appeals, denied Petitioner's motion for permission to appeal the Appellate Division's adverse ruling.

At most, Petitioner asserts that the Commission made erroneous factual findings or did not consider alleged facts that he asserts are relevant to his claim of discrimination. Such assertions do not warrant a grant of certiorari; and the Petition should, therefore, be denied. *See United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

Finally, to the extent Petitioner has requested that this Court review the findings of the Commission that the Respondents did not violate the Administrative Code of the City

of New York or New York State law, a review of these findings is obviously beyond the jurisdiction of this Court.

COUNTERSTATEMENT OF THE CASE AND OPINIONS BELOW

Petitioner is a former employee of The Depository Trust Company ("DTC"), whose employment was terminated in January 1993 after it became evident that he would be unable to return to work. Petitioner subsequently filed a Complaint with the New York City Commission on Human Rights alleging that DTC, as well as Respondents Stuart Fishbein ("Fishbein") and Lori Klebous-Zivny ("Klebous-Zivny"), both DTC employees, discriminated against him because of his disability -- AIDS. Respondents denied all of the charges of discrimination. (A-5-6).

After completing its investigation, the Commission's Law Enforcement Bureau rendered a detailed Opinion, which addressed and rejected all of Petitioner's allegations of discrimination and found no probable cause that discrimination had occurred. (A-5-12). Thereafter, the Determination was affirmed by the Commission on Petitioner's appeal. (A-13).

Petitioner then filed a Petition in Supreme Court, New York County, pursuant to New York City Administrative Code § 8-110, seeking to overturn the Commission's Determination. (A-15). Respondents cross-moved for a judgment confirming the Commission's Determination. (*Id.*) In a Memorandum Decision dated November 17, 1994, the New York Supreme Court, after reviewing each of the issues raised by Petitioner, denied the petition and granted Respondents' cross-motion to confirm the Commission's Determination. (A-15-19). The New York Supreme Court, Appellate Division, subsequently affirmed the New York Supreme Court's dismissal of the petition. (A-21). The New York State Court of Appeals denied Petitioner's motion for leave to appeal this affirmance and subsequently denied Petitioner's motion for reconsideration of the denial of this motion. (A-22-23; A-24-25).

ARGUMENT

REASONS WHY REVIEW IS NOT WARRANTED

Petitioner raises seven questions for review. As set forth below, each of Petitioner's questions are based on factual predicates that are directly contrary to the factual findings of the Commission -- findings that both the New York Supreme Court and the New York Appellate Division found to be supported by substantial evidence. Thus, with respect to each of these issues, Petitioner is asking this Court to assume the role of finder of fact and re-evaluate the evidence presented before the Commission. Because, as the New York courts found, the Commission's factual findings were supported by substantial evidence, this Court should not now re-examine those findings of fact. *See Johnston*, 268 U.S. at 227. Accordingly, the Petition for Writ of Certiorari should be denied.

1. a. Respondents' Request for Necessary Medical Documentation Was Not a Violation of the ADA.

Petitioner asserts that the Supreme Court should consider whether Respondents violated the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* ("ADA") by requesting (in a December 16, 1992 letter) that he return standard long-term disability ("LTD") claim forms that contained "confidential" information regarding his medical condition. This argument was properly rejected by both the New York Supreme Court and New York Appellate Division because these requests for medical information were made pursuant to standardized LTD claim forms that reasonably required disability information, as a condition of receiving LTD benefits. (A-18; A-21). Indeed, it is simply illogical and unreasonable for Petitioner to expect, no less argue, that he should have been able to receive disability payments without revealing his disability. It is plainly not discriminatory -- or improper -- to verify disability status by medical documentation prior to payment of disability benefits.

Finally, there is no evidence in the record that the disability information provided by Petitioner was used in a discriminatory manner. Indeed, the Commission found (*See* A-6), and the New York courts affirmed (*See* A-18-21), that the Petitioner was not subjected to discrimination by Respondents, and this Court should not now reconsider that factual finding.

b. Respondents' Concern About Petitioner's Medical Condition Was Not a Violation of the ADA.

Petitioner next asserts that the Supreme Court should consider whether Respondents violated the ADA by visiting him in the hospital and inquiring about his diagnosis. Nevertheless, contrary to Petitioner's assertion, the Commission found that "the record shows that respondents were concerned for complainant as evidenced by respondent Klebous-Zivny's numerous visits to complainant while he was in the hospital." (A-12).

Accordingly, there is no basis for this Court to review this factual finding by the Commission, or the New York courts' conclusion that it was supported by substantial evidence.

2. Respondents' Request For a Release as a Condition For Granting Petitioner's Request to Inform His Co-Workers of His Disability Was Not Discriminatory.

The Commission specifically found that "[w]hile respondents may have demanded an unequivocal 'release' from complainant before agreeing to disclose his disability, there is no evidence to suggest that [Petitioner] was forced to state that he did not ever plan to return to work." (A-11). In fact, the Commission found that Petitioner voluntarily signed both the September 24, 1992 release, which states that "I do not plan to return to work at this time," and his October 7, 1992 letter, which states that "I can no longer effectively perform my responsibilities at work." (A-9-10).

Thus, the Commission made the specific factual finding, which the New York courts found was supported by

substantial evidence, that the request that Petitioner execute the waiver was not discriminatory. (A-11; A-18-19; A-21). This Court should not now re-examine this factual finding.

In addition, the conduct about which Petitioner now complains would not have violated the Older Workers Benefit Protection Act (the "OWBPA"), 29 U.S.C. § 626(f), which only applies to waivers of claims of age discrimination under the federal Age Discrimination in Employment Act. The OWBPA is inapplicable to Petitioner's claims of disability discrimination.

3. Respondents Did Not Violate ERISA By Purportedly Refusing to Respond to Requests for Pension Material.

Petitioner never raised Respondents' alleged failure to provide him with pension material before the Commission; and, therefore, it is not addressed in the Commission's Determination. (*See* A-7-8). Consequently, this allegation could not be considered by the New York courts. *See* N.Y.C. Admin. Code § 8-123(c). Nor did Petitioner assert before the Commission any purported violations of his rights under the federal Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.* ("ERISA").[1]

In any event, Petitioner only asserts that the Commission "overlooked" the alleged fact that Petitioner was denied requested pension information. As with the other issues raised in the Petition, he does not point to any determination of federal law made by the Commission or the New York courts that would warrant the grant of certiorari on this issue.

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[1] Although Petitioner does not now raise the issue, the Commission also found that "Respondents did not deny pension ... benefits to [Petitioner]." (A-7-8).

4. Petitioner's Job Termination Was Not Discriminatory.

Petitioner's claim that DTC discriminatorily terminated his employment was fully addressed -- and rejected -- by the Commission. Specifically, the Commission made an in-depth and well-reasoned finding that DTC did *not* discriminate against Petitioner by not preserving his position. (A-9-12). The Commission based its determination on the following facts:

(i) "There was no evidence in the record to suggest that [Petitioner] ever formally requested to return to work with [DTC]";

(ii) "[t]he evidence shows that [Petitioner] was never denied his original or a comparable position";

(iii) "the investigation established that [Petitioner] was unable to return to work because of his disability" based on

- a September 17, 1992 letter from Petitioner stating that he "may not return to work";
- a September 24, 1992 letter from Petitioner stating that "I do not plan to return to work at this time";
- an October 7, 1992 letter from Petitioner stating that "I can no longer effectively perform my responsibilities at work . . . I have enjoyed working with all of you and will miss you tremendously"; and
- undisputed medical evidence from Petitioner's doctor demonstrating that he was unable to return to work and would never again be able to resume his job duties.

(*Id*). Thus, the Commission was justified in its conclusion that the foregoing evidence was sufficient to "rebut [Petitioner's]

allegation that he ever applied for, and was denied, the opportunity to return to work with [DTC]." (A-11). Accordingly, the New York courts properly found that this factual finding was supported by substantial evidence, and it should not now be re-examined by this Court.

5. Respondents' Denial of "full" Long-Term Disability Benefits to Petitioner Was Proper.

The Commission found that Petitioner was eligible for, and had been receiving, LTD benefits through DTC's LTD insurance carrier. (A-6). Petitioner alleges, however, that DTC wrongfully based his LTD benefits on his base salary at the time he became disabled, rather than on his increased salary, which was approved in September 1992 after he became disabled. Using the former base yielded a lower LTD benefit. The Commission, however, specifically -- and in great detail -- rejected this argument, concluding that "[n]othing in the investigation supports complainant's allegation that respondents denied him long-term disability benefits or made any decisions regarding benefits based on his disability." (A-6).

Further, the New York Supreme Court carefully reviewed the evidence presented to the Commission regarding Petitioner's LTD benefit entitlement and found that the Commission's determination that his LTD benefits had been properly calculated was based on substantial evidence and was in no way discriminatory. (A-18-19). This finding was properly affirmed by the New York Appellate Division. (A-21).

6. Respondents Did Not Violate the ADA by Not Providing Reasonable Accommodations.

Notwithstanding Petitioner's assertion that the Commission "overlooked" and "misapprehended" two requests for reasonable accommodations, the Commission specifically found, based on its investigation, that Petitioner's "allegation that respondents failed to accommodate him is without merit and must be dismissed." (A-9). The New York courts concluded

that this finding was supported by substantial evidence. (*See* A-18-19; A-21).

Because Petitioner only alleges that the Commission erred in makings its factual determination that he had not been denied a reasonable accommodation, there are no grounds that warrant the grant of certiorari on this issue.

7. Respondents Did Not Violate the ADA by Denying Petitioner Bonus and Vacation Pay.

a. The Alleged Denial of a Bonus

The Commission found that Petitioner was not discriminatorily denied a bonus. (A-8-9). Specifically, after investigation, the Commission found that Petitioner failed to satisfy a necessary condition for receiving a bonus -- that he demonstrate future potential. (*Id.*). The Commission explained that "[r]espondents convincingly established that complainant's future 'potential' as an employee ceased, in effect, after he advised respondents that he was no longer able to return to work. The same would have been true for any other employee whose future potential ceased during the course of the year." (*Id.*) (footnote omitted).

Accordingly, Petitioner's objection to the Commission's findings regarding a bonus must fail because the Commission's rejection of this assertion had a rational basis. Again, this factual finding does not warrant the grant of certiorari in this case.

b. The Alleged Denial of Vacation Pay

Petitioner asserted before the Commission that DTC owed him compensation for six vacation days accrued prior to his hospitalization in July 1992. The Commission rejected this claim, finding that Petitioner used all of his vacation days and that DTC had in fact *advanced* Petitioner over 100 days of sick leave, which assured him a constant and uninterrupted source of income until he became eligible for LTD. (A-8). In particular, the Commission found that "the investigation revealed that complainant used all of his accrued vacation time

during, or shortly after, his July 1992 hospitalization. Specifically, complainant used his vacation time immediately after he ran out of sick leave." (A-8). When the six vacation days at issue are viewed in the context of the 100 day advance, no finding of discriminatory treatment could be justified; and on this basis, the New York Supreme Court found that the Commission's determination on this issue was supported by substantial evidence. (A-19).

Because the evidence regarding Petitioner's vacation pay entitlement was properly weighed by the Commission, and (as the New York courts found) its finding that DTC did not discriminatorily deny him these benefits was supported by substantial evidence, there is no basis for granting certiorari on this issue.

CONCLUSION

Based on the foregoing, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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